

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-220649.2

DATE: April 14, 1986

MATTER OF: Wynn Construction Company--
Request for Reconsideration

DIGEST:

Prior decision is affirmed where request for reconsideration fails to show error in concluding that a low lump-sum bid, although technically nonresponsive as submitted because it mistakenly exceeded a statutory cost limitation for a particular line item, properly could be corrected by reallocating prices to another item since the lump-sum price remained unchanged and, therefore, neither the competition nor the integrity of the sealed bidding system was prejudiced by the correction.

Wynn Construction Company requests reconsideration of our decision in Wynn Construction Co., B-220649, Feb. 21, 1986, 86-1 CPD ¶ ____. In that decision, we held that a low lump-sum bid which exceeded a statutory cost limitation for a particular line item properly could be corrected by reallocating prices to another item so that the bid then conformed to the statutory limitation. Wynn requests reconsideration of our prior decision on the ground that it is legally erroneous. We affirm our decision.

Wynn was the second low bidder under invitation for bids (IFB) No. F34650-85-B-0322, issued by the Department of the Air Force for the repair and renovation of a dining hall at Tinker Air Force Base, Oklahoma. The IFB advised bidders that contract line items 0002 through 0005 were subject to a statutory cost limitation of \$200,000, and that bids which exceeded the cost limitation "may be rejected."

The low bidder, Derrick Construction Company, exceeded this limitation by pricing line item 0002 at \$250,000, and the contracting officer rejected the firm's bid. However,

Derrick then immediately advised the contracting officer that it had made a mistake in its bid by including substantial prices for various equipment and work in item 0002 which instead should have been included in item 0001. Derrick submitted bid worksheets to support its claim of mistake and its actual intended prices, and the firm was permitted to correct its bid by reallocating prices between line items 0001 and 0002 so that the statutory limitation was no longer exceeded. This reallocation had no effect upon Derrick's total bid price, and the firm was then awarded the contract.

In deciding Wynn's subsequent protest of the award, we agreed with Wynn that Derrick's bid as submitted was nonresponsive and, thus, ordinarily would not be subject to correction. Nevertheless, viewing the totality of the circumstances, we concluded that there was nothing objectionable in the contracting officer's decision to permit Derrick to correct its bid. We failed to find that this action had any prejudicial effect upon either the competition or the integrity of the sealed bidding system. The allowed correction did not change Derrick's low lump-sum bid price, the bid as corrected did not become materially unbalanced due to the reallocation of prices between items 0001 and 0002, and there was no argument raised that the evidence offered by Derrick to support its claim of mistake and its intended prices was insufficient for correction purposes. Although Derrick's bid admittedly was technically nonresponsive as submitted, we did not believe that the government was required to accept Wynn's \$58,000 higher bid because of what was, in effect, a mere bookkeeping error on Derrick's part.

In its request for reconsideration, Wynn strongly urges that our prior decision is legally erroneous because it violates fundamental principles of federal procurement. Wynn continues to assert that Derrick's bid was nonresponsive because it did not conform to the statutory cost limitation imposed for line items 0002 through 0005 and, therefore, in Wynn's view, could not be corrected. Wynn notes in this regard that the Federal Acquisition Regulation (FAR) expressly provides that any bid which fails to conform to the essential requirements of the IFB shall be rejected, FAR, § 14.404-2(a) (FAC 84-5, Apr. 1, 1985), and that the correction procedures are limited to bids that are responsive as submitted and may not be used to permit correction of bids to make them responsive. FAR, § 14.406-3. Wynn contends that our prior decision effectively disregarded

these regulatory provisions by improperly considering the fact that adherence to them would result in the award of a higher priced contract.

Moreover, Wynn believes that we legally erred in concluding that the bid correction had no prejudicial effect upon either the competition or the integrity of the sealed bidding system. Wynn asserts that bidders which took care to submit bids conforming to the statutory cost limitation were prejudiced in that Derrick, which ignored the IFB's requirements, was enabled to receive an award on the basis of a nonresponsive bid. Wynn also contends that our decision, in effect, has endorsed continued arbitrary practices by officials at the contracting activity. Wynn states in this regard that low bids under previous solicitations issued by the activity were rejected for failure to conform to statutory cost limitations, and that the bidders were never allowed to correct their bids as was Derrick. Thus, Wynn believes that our decision creates an inequitable "double standard" to the prejudice of the competitive system.

Wynn also asserts that our decision will encourage bidders who have been rejected for violating statutory cost limitations imposed for certain items to claim a mistake in bid after notice of rejection and, accordingly, to prepare fraudulent workpapers to support the claim.

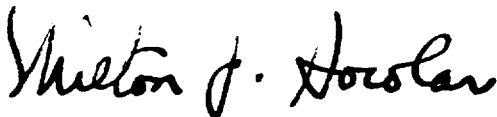
We have considered the arguments raised by Wynn in its present request for reconsideration, but do not agree that our prior decision contains errors of law so as to require its reversal or modification. See Wheeler Brothers, Inc., et al.--Request for Reconsideration, B-214081.3, Apr. 4, 1985, 85-1 CPD ¶ 388.

Our prior decision recognized that a purely mechanistic application of the basic rule precluding the correction of nonresponsive bids, FAR, § 14.406-3, supra, may work a result not in the government's best interest where a waiver of that rule would clearly not be prejudicial to other bidders and would not adversely affect the sealed bidding system. Although Derrick's bid may have been technically nonresponsive, clear and convincing evidence was submitted to establish that, but for what was tantamount to a bookkeeping error, Derrick had intended to submit its bid in conformity with the statutory cost limitation imposed for items 0002 through 0005 without a change to the total lump-sum price bid. The total lump-sum price, not the separate item prices, was the basis upon which the competition was conducted. Therefore, the bid correction, by reallocating line item

prices where they belonged, permitted the award consistent with the statutory cost limitation without affecting the essential aspect of the competition--the lump-sum prices bid. We do not agree that such a result is arbitrary or that it creates a "double standard" in such matters.

Finally, we do not agree that our decision will encourage rejected bidders to claim a mistake and to manipulate the bid correction procedures to their competitive advantage, since permissible correction of a bid not conforming to a statutory cost limitation for certain line items only involves a reallocation of item prices within the bid, therefore having no effect upon the total bid price. In any event, with regard to Wynn's contention that rejected bidders in such a situation would submit fraudulent workpapers to support a claim of mistake, the regulations effectively militate against this possibility by requiring that evidence to establish both the existence of the mistake and the actual bid intended be "clear and convincing" before any determination may be made permitting correction. FAR, § 14.406-3(a). It is the well-settled view of this Office that the government is protected from potential fraud by the high standard of proof necessary before correction is authorized and the independent review of the submitted evidence by an appropriate higher authority of the contracting agency. 53 Comp. Gen. 232 (1973).

Our prior decision is affirmed.

for 
Comptroller General
of the United States